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CHARLES ELMORE CROPLEY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945. No. 718 .

LEHIGH NAVIGATION COAL CO., INC.; THE LEHIGH VALLEY COAL COMPANY, INC.; WINTON COAL MINING CO., INC.; ST. CLAIR COAL CO.; PEACH MOUNTAIN COAL MINING CO.; FRACKVILLE COAL CO., INC.; BELL COLLIERY COMPANY; POTTSVILLE COAL COMPANY; PRIMROSE COAL COMPANY; MARY D. COAL MINING COMPANY; JONES COAL CORPORATION; HADDOCK MINING COMPANY; OTTO COLLIERIES COMPANY; REPPLIER COAL COMPANY; GLEN ALDEN COAL COMPANY; AND MOREA-NEW BOSTON BREAKER CORP.

Petitioners,

v.

JOHN B. KELLY, INC.,

Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILLIAM A. SCHNADER,
E. RUSSELL SHOCKLEY,
ARTHUR LITTLETON,
THOMAS C. EGAN,
*Counsel for Petitioners.*

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

# INDEX.


PAGE

PETITION FOR WRIT OF CERTIORARI ..... 1

STATEMENT OF THE MATTER INVOLVED ..... 2

THIS COURT HAS JURISDICTION ..... 5

QUESTIONS PRESENTED ..... 7

REASONS RELIED UPON FOR ALLOWANCE OF WRIT ..... 8

BRIEF IN SUPPORT OF PETITION ..... 13

I. OPINIONS OF THE COURTS BELOW ..... 13

II. JURISDICTION ..... 13

III. STATEMENT OF THE CASE ..... 13

IV. SPECIFICATION OF ERRORS ..... 13

V. ARGUMENT ..... 14

*A.* What is the Matter in Controversy and the Test of its Value for Jurisdictional Purposes? ..... 14

*B.* Defendants Are Not Joint Tort-Feasors; Therefore The Jurisdictional Amount Must Be Shown As To Each Defendant ..... 17

*C.* Plaintiff Has Not Averred Any Facts Sufficient to Show The Jurisdictional Amount ..... 19

*D.* Face of Complaint Reveals that Plaintiff is not Legally Entitled to any Equitable Relief or Damages; Therefore Jurisdictional Amount is not Present ..... 24

## TABLE OF CASES CITED.

PAGE

The Buck Mountain Coal Company *v.* The Lehigh Coal and Navigation Company, 50 Pa. 91 (1865)..... 26

Chamberlain *v.* Browning, 177 U. S. 605, 20 S. Ct. 820 (1900)..... 18

Clark, Director of Department of Motor Vehicles *v.* Paul Gray, Inc., *et al.* 306 U. S. 583 (1939).....9, 18, 20

Elder *v.* Leichens Coal Company, 157 Pa. 490 (1893)..... 31

Ex Parte Phoenix Insurance Company, 117 U. S. 367, 6 S. Ct. 772 (1886).. 18

Gibbs, Attorney General, *et al. v.* Buck, 307 U. S. 66, 59 S. Ct. 725 (1939)..5, 17

Gold *v.* The City of Philadelphia, 115 Pa. 184 (1886)..... 27

Harvey *v.* Susquehanna Coal Company, 201 Pa. 63 (1902)..... 31

Knowles *v.* Pennsylvania Railroad Company, 175 Pa. 623 (1896)..... 29

Kvos, Inc. *v.* Associated Press, 299 U. S. 269, 56 S. Ct. 197 (1936).....5, 17

Leitch *v.* City of Chicago *et al.* (C. C. A. 7th, 1930) 41 F. (2d) 728 [*Certiorari* denied, 282 U. S. 891 (1930) ].....9, 17, 23

McNutt, Governor of Indiana *v.* General Motors Acceptance Corp., 298 U. S. 178, 56 S. Ct. 780 (1936).....5, 9, 15, 21

The Pennsylvania Coal Company *v.* Sanderson, 113 Pa. 126 (1886).....7, 29

Philadelphia *v.* Philadelphia Suburban Water Co., 309 Pa. 130 (1932)..... 34

Rhymer *v.* Fretz, 206 Pa. 230 (1903)..... 28

Saint Paul Mercury Indemnity Co. *v.* Red Cab Company, 303 U. S. 283, 58 S. Ct. 586 (1938).....5, 24

IN THE

# Supreme Court of the United States

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OCTOBER TERM, 1915. No. .

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*Lehigh Navigation Coal Co., Inc; The Lehigh Valley Coal Company, Inc.; Winton Coal Mining Co., Inc.; St. Clair Coal Co.; Peach Mountain Coal Mining Co.; Frackville Coal Co., Inc.; Bell Colliery Company; Pottsville Coal Company; Primrose Coal Company; Mary D. Coal Mining Company; Jones Coal Corporation; Haddock Mining Company; Otto Collieries Company; Repplier Coal Company; Glen Alden Coal Company; and Morea-New Boston Breaker Corp.,*

*Petitioners,*

v.

*John B. Kelly, Inc.,*

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Corporations organized under the laws of the Commonwealth of Pennsylvania, respectfully

pray this Court for the issuance of a Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit, to review a final judgment of that Court entered on October 4, 1945, reversing an Order of the District Court of the United States for the Eastern District of Pennsylvania, entered on March 15, 1944.

A certified transcript of the record in the case, including the proceedings in said Circuit Court of Appeals, together with the requisite additional copies thereof, is furnshed herewth, in conformity with Rule 38 of this Court.

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## STATEMENT OF THE MATTER INVOLVED.

The issues presented to this Court in this case arise out of the jurisdictional problem relating to the proper method of calculating the jurisdictional amount in a diversity of citizenship case.

The plaintiff is a Delaware Corporation.

The defendants are Corporations of the Commonwealth of Pennsylvania. The first paragraph of the bill of complaint alleges that "the amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000). The complaint further states that the plaintiff is engaged in the business of brick masonry construction work and owns a property having frontage on the Schuylkill River, in Philadelphia, on which there is located its alleged piers and docks. The complaint alleges that the sixteen companies named as defendants are engaged in the operation of coal mines with plants adjacent to the upper Schuylkill River or its tributary streams. It is further alleged that the defendants are discharging, and for a long time have discharged, coal dust, culm, and various other refuse materials into these waters, the result of which has been to impair the navigability of the River, to raise its bed, and to narrow its channel, thereby affecting in various ways and to

various degrees all communities, and their residents, along the River. In the case of the plaintiff it is averred that these deposits on the bed of the River adjacent to plaintiff's property prevent plaintiff from obtaining building materials by way of the River. As a further result, it is alleged that any abnormal increase in the level of its waters causes it to overflow its banks and to do damage to plaintiff's property and to disrupt plaintiff's business. The complaint sets forth that such damage is brought about by the "united and combined acts" of the defendants in thus discharging the waste materials, and that such materials and deposits are so "united, combined, and intermingled" within the waters of said Schuylkill River and its tributary streams as to be impossible of tracing to any individual defendant. Injunctive and other relief is stated in the complaint which has joined the sixteen coal company defendants and has aggregated plaintiff's alleged claims against each of the defendants for the purpose of showing the jurisdictional amount.

The defendants filed a joint motion to dismiss the complaint upon the ground that the District Court has no jurisdiction to hear and determine the action, contending that any liability resulting from the acts set forth in the complaint is, under the law of Pennsylvania, several and not joint, and that claims against several tort-feasors may not be aggregated to establish the requisite amount in controversy for Federal jurisdictional purposes. The defendants further contended that the primary matter in controversy is an alleged invasion of the right of the plaintiff, which it has in common with other members of the general public, to have the navigability of the Schuylkill River free from impairment by the alleged actions by the various defendants. Under the law of Pennsylvania, plaintiff has a standing to enjoin such a public nuisance only if plaintiff has suffered injury therefrom different in kind and degree from that suffered by other members of the general public coming into contact with

the nuisance. Accordingly, the test of the value of the matter in controversy must be limited to the actual damages, if any, suffered by plaintiff from the independent actions of each defendant, and such damages must be different in kind and degree from that suffered by other riparian owners and members of the general public. Defendants also contended that the complaint was destitute of any facts necessary to show that the jurisdictional amount was involved, there being nothing averred as to the value of the right alleged to be injured or the extent of the alleged injury thereto, other than a general averment of jurisdictional amount.

The District Judge accepted the contention of the defendants as the valid one under the authorities, and dismissed the complaint by an Order and Opinion filed March 15, 1944, on the ground that "Since, therefore, the action against these defendants is, under Pennsylvania law, several and not joint the complaint fails to show that the amount in controversy with respect to the claim against any single defendant exceeds the jurisdictional amount, it is insufficient to show that this Court has jurisdiction of the case."

The plaintiff appealed from this Order of the District Court dismissing its bill of complaint, and on October 4, 1945, the United States Circuit Court of Appeals for the Third Circuit reversed the Order of the District Court aforesaid on the ground that in an action of this nature the money damage allegations of the bill are merely a collateral item, the essence of the plaintiff's suit being the injunctive protection which it seeks to invoke to prevent a continuing trespass upon its property, and that consequently the jurisdictional amount is to be calculated on the basis of the value of the property right which is being protected; however, the Court failed to pass upon the contention that the complaint was destitute of any facts necessary to show the value of the right or the extent of injury thereto. In reaching this conclusion the

Circuit Court also held that the allegations in the bill of complaint were sufficient to establish that plaintiff suffered a special kind of injury different in kind and degree from that suffered by members of the general public coming into contact with the nuisance. Similarly, the Court found that the allegations of the bill of complaint entitled the plaintiff to equitable relief or to monetary damages under the decisional and statutory law of Pennsylvania relative to the mining industry.

On October 19, 1945, your Petitioners filed a petition to stay issuance of mandate pending petition for certiorari.

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## THIS COURT HAS JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of The Judicial Code, as amended by the Act of February 13, 1925, C. 229, 43 Stat. 937, 28 U. S. C. A., Section 347. The Opinion and Judgment of the Circuit Court of Appeals was filed on October 4, 1945.

The jurisdiction of this Court is invoked for the purpose of determining whether the Circuit Court of Appeals erred in defining the matter in controversy in this case and applied the correct test of its value for jurisdictional purposes, having regard to the fact that the case was presented solely upon the pleadings as a result of the defendants' motion to dismiss. This Court has repeatedly taken jurisdiction of cases involving the question whether or not the jurisdictional amount was present. See McNutt, Governor of Indiana v. General Motors Acceptance Corp., 298 U. S. 178, 56 S. Ct. 780 (1936); Kvos, Inc. v. Associated Press, 299 U. S. 269, 56 S. Ct. 197 (1936); Saint Paul Mercury Indemnity Co. v. Red Cab Company, 303 U. S. 283, 58 S. Ct. 586 (1938); Gibbs, Attorney General, et al. v. Buck, 307 U. S. 66, 59 S. Ct. 725 (1939).

Specifically, your petitioners contend that the Circuit Court of Appeals erred in the following respects:

(*a*) In holding that the matter in controversy is plaintiff's right to occupy or enjoy its property and to function as a business organization. The defendants contend that the primary matter in controversy is an alleged invasion of the right of plaintiff, which it has in common with other members of the general public, to have the navigability of the Schuylkill River free from impairment by the alleged actions by the various defendants;

(*b*) In holding that the value of the above defined matter in controversy is the test for jurisdictional purposes irrespective of the extent to which such right is alleged to have been injured. Since, under the law of Pennsylvania, the plaintiff has a standing to enjoin a public nuisance only if plaintiff has suffered injury therefrom different in kind and degree from that suffered by other members of the general public, the defendants contended that the test of the value of the matter in controversy must be limited to the actual damages, if any, suffered by plaintiff from the independent actions of each defendant;

(*c*) In holding that plaintiff in its complaint has sufficiently averred a special injury different in kind and degree from that suffered by members of the general public coming into contact with the nuisance. Defendants took the position that under the appropriate Pennsylvania decisions plaintiff had pleaded special injury differing only as to degree and not in kind from that suffered by other members of the general public; therefore, there was no matter in controversy as the plaintiff had no standing to maintain the same;

(*d*) In holding that under the decisional and statutory law of Pennsylvania relative to the mining industry, the plaintiff is entitled to the equitable relief and monetary damages sought. The defendants took the position that

under Pennsylvania decisions such as THE PENNSYLVANIA COAL COMPANY v. SANDERSON, 113 Pa. 126 (1886), plaintiff would, under no circumstances, be entitled to the absolute equitable relief sought and that plaintiff is not entitled to monetary damages because it has failed to aver to what extent defendants are engaged in mining operations contrary to the decisional and statutory law of Pennsylvania;

(*e*) In failing to hold that under the decisions of this Court a bill of complaint must aver facts essential to show that the jurisdictional amount is present and that jurisdictional amount must be shown with respect to each defendant, as under the decisions of Pennsylvania the defendants are not joint tort-feasors. Defendants took the position that plaintiff's complaint was insufficient under the decisions of this Court in view of the fact that it is destitute of any averments relating to the value of the right in question or the extent of any injury thereto, the complaint merely containing a general jurisdictional statement that the matter in controversy is in excess of $3.000. In effect, the complaint, read as a whole, aggregates the alleged damages sought from the various defendants despite the fact that under the decisions of this Court the jurisdictional amount must be pleaded with respect to each defendant where they are not joint tort-feasors.

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## QUESTIONS PRESENTED.

Where a lower riparian owner of lands seeks equitable relief (and monetary damages) from a public nuisance (impairment of navigability of a river by deposits of mine wastes) allegedly created by sixteen upper riparian owners (who under local law would not be joint tort-feasors), and avers that it has suffered special damage—which, under the State law, must differ in kind and degree from that suffered by other riparian owners—

because of its inability to utilize its pier and docks and from the occasional flooding of its property, must the amount in controversy against each upper riparian owner be measured by the damage suffered by the lower riparian owner from such upper riparian owner?

Where a plaintiff in a civil action seeks injunctive relief and monetary damages against sixteen alleged tort-feasors, whose liability, if any, would be several and not joint, must the bill of complaint set forth facts essential to show either the value of the right involved or the extent of the injury thereto, and that the jurisdictional amount is involved as to each tort-feasor?

Must the bill of complaint be dismissed for want of jurisdictional amount where it appears to a legal certainty from the face of the bill of complaint that the equitable relief and the monetary damages praved for may not be recovered under the governing decisional and statutory State law?

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## REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The discretionary power of this Court to grant a Writ of Certiorari is invoked upon the following grounds, namely:

(*a*) The Circuit Court of Appeals in its decision states that in cases concerning injunctions against public acts, "the recent trend of the United States Supreme Court has been to narrow its construction of the jurisdictional amount in controversy", thereby implying that the principles established by this Court in such decisions are not applicable to injunction suits involving private acts, in so far as the jurisdictional amount is concerned. This is wholly unwarranted because the statute prescribing the jurisdictional amount makes no such distinction.

To say the least, the public interest requires a clarification of this uncertainty, in so far as jurisdictional amount is concerned in injunction cases.

(*b*) The Circuit Court of Appeals has decided a federal question (jurisdictional amount) in a way probably in conflict with recent applicable decisions of this Court. Under recent decisions of this Court it has been held that a plaintiff must allege in his pleadings the facts essential to show jurisdiction and that a mere general averment of the jurisdictional amount is not sufficient. McNutt, Governor of Indiana v. General Motors Acceptance Corp., 298 U. S. 178, 189 (1936). Despite the fact that the plaintiff failed to make the necessary allegations with respect to the value of the right alleged to be invaded by the defendants, the Circuit Court of Appeals reinstated the plaintiff's bill of complaint on the strength of a general averment as to jurisdictional amount.

Moreover, the Circuit Court of Appeals reinstated the plaintiff's bill of complaint on the strength of a general averment of the jurisdictional amount despite the fact that this Court in Clark, Director of Department of Motor Vehicles v. Paul Gray, Inc., et al., 306 U. S. 583 (1939), held that a general allegation of jurisdictional amount is insufficient where there are numerous parties having no joint or common interest in the subject matter of the suit.

(*c*) The position of the Circuit Court of Appeals with respect to jurisdictional amount is inconsistent with the decision of Leitch v. City of Chicago, et al. (C. C. A. 7th, 1930), 41 F. (2d) 728 [Certiorari denied, 282 U. S. 891, (1930)].

(*d*) The Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable Pennsylvania decisions relating to the mining industry. Under the decisional and statutory law of Pennsylvania, if mine wastes escape into the river with injurious results, any damages resulting are *damnum*

*absque injuria* provided presently-known precautionary methods are taken by the defendants. The bill of complaint sustained by the Circuit Court of Appeals seeks an absolute injunction against the defendants from discharging any mine wastes whatsoever into the river and as a basis for monetary damages avers that the defendants are negligent in their efforts to prevent pollution of the river without specifying in any way the manner in which the defendants are derelict in this respect.

(*e*) The Circuit Court of Appeals has decided another important question of the law in a way probably in conflict with the applicable Pennsylvania decisions. The plaintiff in its bill of complaint pleaded a public nuisance (impairment of the navigability of the Schuylkill River) and by way of special injury averred that the culm deposits in the bed of the River prevent plaintiff from utilizing the River for obtaining building materials, and that the occasional overflow of the River resulting from storms disrupted plaintiff's business and depreciated the value of its property. Under Pennsylvania decisions, plaintiff has no standing to enjoin a public nuisance unless it can show injury different in kind and degree from that suffered by other persons coming into contact with the nuisance. The Circuit Court of Appeals held that plaintiff had pleaded the special injury required under the Pennsylvania decisions despite the fact that the alleged injury suffered by the plaintiff is merely different in degree from that suffered by other riparian owners located along the River.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari be issued under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this

cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of said Circuit Court of Appeals be reversed; and that your petitioners be granted such other and further relief as to this Honorable Court may seem meet.

LEHIGH NAVIGATION COAL CO., INC.; THE LEHIGH VALLEY COAL COMPANY, INC.; WINTON COAL MINING CO., INC.; ST. CLAIR COAL CO.; PEACH MOUNTAIN COAL MINING CO.; FRACKVILLE COAL CO., INC.; BELL COLLIERY COMPANY; POTTSVILLE COAL COMPANY; PRIMROSE COAL COMPANY; MARY D. COAL MINING COMPANY; JONES COAL CORPORATION; HADDOCK MINING COMPANY; OTTO COLLIERIES COMPANY; REPPLIER COAL COMPANY; GLEN ALDEN COAL COMPANY; and MOREA-NEW BOSTON BREAKER CORP., Petitioners.

By

WM. A. SCHNADER,
E. RUSSELL SHOCKLEY,
ARTHUR LITTLETON,
THOMAS C. EGAN,
Counsel for Petitioners.

## BRIEF IN SUPPORT OF PETITION.

### I.

### OPINIONS OF THE COURTS BELOW.

The opinion of the District Court of the United States for the Eastern District of Pennsylvania is reported in 54 F. Supp. 472 and was handed down March 15, 1944.

The opinion of the United States Circuit Court of Appeals for the Third Circuit was handed down on October 4, 1945, and is unreported as yet.

### II.

### JURISDICTION.

(*a*) The jurisdiction of this Court is invoked under Section 240 (a) of The Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 937, 28 U. S. C. A. Section 347.

(*b*) The judgment of the United States Circuit Court of Appeals for the Third Circuit, which petitioners seek to have reviewed, was dated and filed on October 4, 1945.

### III.

### STATEMENT OF THE CASE.

A sufficiently full statement of the case has been given in the Petition under the heading "Statement of the Matter Involved", and in the interest of brevity is not repeated here.

### IV.

### SPECIFICATION OF ERRORS.

A statement of the errors intended to be urged has been given in the Petition under the heading "This Court Has Jurisdiction," and in the interest of brevity is not repeated here.

## V.

## ARGUMENT.

Petitioner's argument would be directed to the following matters:

(1) What is the matter in controversy and the test of its value for jurisdictional purposes?

(2) Defendants are not joint tort-feasors, therefore, the jurisdictional amount must be shown as to each defendant.

(3) Plaintiff has not averred any facts sufficient to show the existence of the jurisdictional amount.

(4) The face of the complaint reveals that plaintiff is not legally entitled to any equitable relief or damages, therefore, the jurisdictional amount is not present.

### A.

### What is the Matter in Controversy and the Test of its Value for Jurisdictional Purposes?

The Circuit Court of Appeals took the position that the plaintiff's right to occupy and enjoy its property and to function as a business organization and the protection of that right is the matter in controversy, the amount of which plaintiff, in the first paragraph of the bill of complaint, alleges exceeds $3,000.

Petitioners submit that the Circuit Court of Appeals was in error in this respect, having regard to the averments of the bill of complaint.

Generally, the plaintiff avers that the alleged discharge or deposit of mine wastes by defendants into the Schuylkill River and its tributary streams (either directly or by erosion) has so raised the bed of the River and so narrowed its channel that its value for navigation is being destroyed and the River overflows its banks whenever there is any appreciable increase in the quantity of water through rains or otherwise (Paragraphs 7, 8, 9, 10,

12, 14); and that the discharge or deposit of mine wastes in such manner is a nuisance affecting in various ways and to various degrees all communities and their residents along the River (Paragraph 14).

The Circuit Court agreed with the petitioners that the nuisance referred to by the plaintiff would be a public nuisance under the law of Pennsylvania, particularly as it involves an impairment of the navigability of a navigable stream.

As will be demonstrated later, plaintiff, under the law of Pennsylvania, has a standing to enjoin such a public nuisance only if it can show that it has suffered injury therefrom different in kind and in degree from that suffered by other riparian owners and members of general public coming into contact with the nuisance.

Accordingly, petitioners submit that the test of the value of the matter in controversy must be limited to the actual damages, if any, suffered by plaintiff that differ in kind and degree from that suffered by other riparian owners and members of the general public.

In McNutt, Governor of Indiana v. General Motors Acceptance Corp., 298 U. S. 178, 56 S. Ct. 780, 80 L. Ed. 183 (1936), suit was brought to enjoin the enforcement of the Indiana Retail Installment Sales Act. The complaint contained various allegations relative to the size of plaintiff's business in Indiana but failed to set forth any facts showing the extent of loss of business which might result from regulation. The Supreme Court reversed the decree of the lower Court granting the injunction with directions to dismiss the complaint for want of jurisdiction. In so doing Mr. Chief Justice Hughes pointed out, at page 181:

> "Respondent invokes the principle that jurisdiction is to be tested by the value of the object or right to be protected against interference. *Hunt* v. *New York Cotton Exchange*, 205 U. S. 322; *Bitterman* v. *Louisville & Nashville R. Co.*, 207 U. S. 205; *Berry-*

*man* v. *Whitman College*, 222 U. S. 334; *Glenwood Light Co.* v. *Mutual Light Co.*, 239 U. S. 121; *Healy* v. *Ratta*, 292 U. S. 263. But in the instant case, the statute does not attempt to prevent respondent from conducting its business. There is no showing that it cannot obtain a license and proceed with its operations. The value or net worth of the business which respondent transacts in Indiana is not involved save to the extent that it may be affected by the incidence of the statutory regulation. The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. * * *"

*

The Circuit Court of Appeals took the position that the value of the rights to be protected provides the test for jurisdictional amount, irrespective of the damage alleged to have been suffered by plaintiff as a result of the alleged actions of the respective defendants. However, there is no averment in the complaint that the plaintiff has been unable to transact its business because of the alleged nuisance. On the contrary, plaintiff avers that it is unable to receive building materials by means of boats or barges on the River and that its business is occasionally interrupted by flood waters (Paragraphs 5, 12).

In Paragraph 10 of the complaint, plaintiff avers that the alleged nuisance is destroying the value of the plaintiff's property for the receipt and discharge of building materials by boats or barges. Accordingly, it is clear that the plaintiff is able to obtain building materials either by the railroad, which runs adjacent to its property, or by truck. Hence, as this Court pointed out in the McNutt case, *supra*, the value of the amount in controversy must be measured by the loss, if any, resulting from the exist-

ence of the alleged nuisance. This would be true, even if the Circuit Court of Appeals is correct in its position as to the matter in controversy.

The following cases of this Court also support petitioner's argument as to the matter in controversy and the test of its value: Kvos, Inc. v. Associated Press, 299 U. S. 269, 56 S. Ct. 197 (1936); Gibbs, Attorney General, et al. v. Buck, 307 U. S. 66, 59 S. Ct. 725 (1939). See also Leitch v. City of Chicago, et al. (C. C. A. 7th, 1930), 41 F. (2d) 728, certiorari denied, 282 U. S. 891, 51 S. Ct. 106 (1930).

**B.**

**Defendants Are Not Joint Tort-Feasors; Therefore The Jurisdictional Amount Must Be Shown As To Each Defendant.**

The Circuit Court of Appeals conceded that the Pennsylvania law, controlling on the substantive matters involved in the present controversy, holds that the liability of the defendants is several and not joint. However, that Court refused to hold that the plaintiff was required to show the existence of the jurisdictional amount with respect to each defendant. Instead, that Court held that the damage allegations of the bill were merely a collateral item to the injunctive feature of the litigation. In this respect, we believe that the Circuit Court of Appeals was in error.

While Rule 20 has liberalized the joinder of claims and parties, it has not altered the substantive rights of the litigants. The Act (48 Stat. 1064, 28 U. S. C. A. §723b, §723c) under which the new rules were promulgated expressly provides:

> "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

Accordingly, where two or more defendants are joined by the same plaintiff in one suit, the pecuniary test of

jurisdiction still is ordinarily founded on the joint or several character of their liability. If the liability is several, the respective claims cannot be aggregated for jurisdictional purposes but must be pleaded separately with respect to each defendant. CHAMBERLAIN v. BROWNING, 177 U. S. 605, 20 S. Ct. 820 (1900); EX PARTE PHOENIX INSURANCE COMPANY, 117 U. S. 367, 6 S. Ct. 772 (1886); CLARK, DIRECTOR OF DEPARTMENT OF MOTOR VEHICLES v. PAUL GRAY, INC., ET AL., 306 U. S. 583 (1939). See also 1 Moore's Fed. Practice, 542, 543.

In the present case, the plaintiff has seen fit to join in one action separate actions at law for damages against sixteen defendants whose liability is several, together with an equitable action against such defendants. Plaintiff in its complaint has aggregated its claims against the various defendants for the purpose of showing the jurisdictional amount.

The complaint contains no allegation whatsoever that the amount involved as to any one or more of the defendants individually exceeds the jurisdictional amount of three thousand dollars ($3,000). On the contrary, in Paragraph 11 of the complaint, it is averred that the mine wastes alleged to have been discharged by the defendants into the River "are so united, combined and intermingled within the River" as to be impossible of tracing to any individual defendant, and that "the injury and damage to the plaintiff is brought about by the united and combined acts of the defendants". In Paragraph 1, the complaint merely sets forth the formal allegation that the amount in controversy exceeds the sum of three thousand dollars ($3,000).

The Circuit Court of Appeals was clearly in error in holding that the legal actions for damages were incidental to the equitable relief sought by the plaintiff. In order to bring the action against the respective defendants for damages, without seeking equitable relief as well, it would have been necessary for the plaintiff to show the

existence of the jurisdictional amount with respect to each defendant. The mere fact that the plaintiff saw fit to combine legal actions with the equitable action does not change the situation.

It is true, as pointed out by the Circuit Court of Appeals, that in Paragraph 3 of the prayer for relief the plaintiff prays that "the amount of damage" sustained by it through the alleged acts of the defendants be ascertained and assessed against the defendants in proportion to their contribution to the injury and damage. However, this falls far short of pleading the jurisdictional amount with respect to each defendant.

As a matter of fact, the plaintiff in its Brief filed with the Circuit Court of Appeals (p. 14) admitted that the averment of jurisdictional amount does not indicate that the plaintiff has a claim for monetary damages in excess of three thousand dollars ($3,000) against each individual defendant.

Accordingly, the Circuit Court of Appeals was in error in holding that the plaintiff was not obligated to show the jurisdictional amount with respect to each defendant insofar as the averments for monetary damages are concerned.

## C.

### Plaintiff Has Not Averred Any Facts Sufficient to Show the Jurisdictional Amount.

The only averment in the complaint relative to the jurisdictional amount is a simple averment that "the amount in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000)." Nowhere in the complaint is there any other allegation relating to the value of the right alleged to be invaded or to the amount involved as to each individual defendant. Likewise, there are no facts averred in the complaint from which these matters may be inferred. This is true

irrespective of what view is taken as to the matter in controversy. Under the decisions of this Court, this in itself is a fatal defect in the complaint, insofar as the jurisdictional amount is concerned.

Strangely enough, the Circuit Court of Appeals avoided all mention of this subject in its opinion, notwithstanding that this point was argued at length before the Court, and notwithstanding that there are no facts averred in the complaint showing the value of the right held by the Court to be the matter in controversy. Clearly that court was in error in that respect even on its own theory of the case.

In CLARK, DIRECTOR OF DEPARTMENT OF MOTOR VEHICLES v. PAUL GRAY, INC., ET AL., 306 U. S. 583, 59 S. Ct. 744, 83 L. Ed. 1001 (1939), which involved a suit by various plaintiffs against certain state officials to enjoin the enforcement of the California Caravan Act of 1937 and where license fees payable by each plaintiff except one did not exceed the jurisdictional amount, Mr. Justice Stone, in reversing the lower Court on the ground that the jurisdictional amount did not appear, stated, at pages 588, 589:

> "* * * The bill of complaint alleges generally that 'the amount involved in this litigation is in excess of Three Thousand Dollars ($3,000.00) exclusive of interest and costs.' But it is plain that this allegation is insufficient to satisfy jurisdictional requirements where there are numerous plaintiffs having no joint or common interest or title in the subject matter of the suit. * * *
>
> "* * * The general allegation in the bill of complaint that 'the amount involved in this litigation is in excess of' $3,000 and the finding of the court that 'the amount involved in the within action' exceeds the jurisdictional amount, give no indication that the amount in controversy with respect to the

claim of any single plaintiff exceeds the jurisdictional amount and are insufficient to show that the district court had jurisdiction of the cause. *Pinel* v. *Pinel, supra.*"

In McNutt, Governor of Indiana v. General Motors Acceptance Corp., 298 U. S. 178, 56 S. Ct. 780, 80 L. Ed. 183 (1936), the General Motors Acceptance Corporation of Indiana sought to enjoin an Act regulating but not prohibiting the business of the corporation. The complaint contained various allegations relative to the size of the plaintiff's business in Indiana but failed to set forth any facts showing the extent of loss of business which might result from the regulatory Act. The Supreme Court reversed the decree of the lower Court granting the injunction with directions to dismiss the complaint for want of jurisdiction. In so doing, Mr. Chief Justice Hughes pointed out, at page 181:

"* * * The object or right to be protected against unconstitutional interference is the right to be free of that regulation. The value of that right may be measured by the loss, if any, which would follow the enforcement of the rules prescribed. The particular allegations of respondent's bill as to the extent or value of its business throw no light upon that subject. They fail to set forth any facts showing what, if any, curtailment of business and consequent loss the enforcement of the statute would involve. The bill is thus destitute of any appropriate allegation as to jurisdictional amount save the general allegation that the matter in controversy exceeds $3,000. That allegation was put in issue and the record discloses neither finding nor evidence to sustain it."

Mr. Chief Justice Hughes then pointed out that the burden was upon the plaintiff to make the necessary

allegations showing jurisdiction. In this connection he pointed out, at page 189:

> "* * * The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. *He must allege in his pleadings the facts essential to show jurisdiction.* If he fails to make the necessary allegations he has no standing." (Italics ours.)

The bill of complaint reveals that plaintiff's alleged special injury, using plaintiff's own words, is in the form of "large and irreparable damages through the permanent depreciation of the value of its property and through the curtailment of the lawful uses to which such property might be put by the plaintiff" (Paragraph 16) because plaintiff is unable to obtain building materials by means of boats and because of the occasional overflow of the river (Paragraphs 5 and 10).

There is nothing in such general averments from which this Court could even reasonably infer the amount of injury alleged to have been suffered by the plaintiff by the action of each of the defendants. This Court in the cases cited above has clearly indicated that such general and indefinite averments are insufficient to meet the burden upon the plaintiff to show the jurisdictional amount.

Nowhere in the complaint does the plaintiff point out the date it acquired its property; whether the condition of the Schuylkill River adjacent to plaintiff's property in any wise changed between the date plaintiff acquired its property and the date of the filing of this complaint; whether at the time of acquisition of the property boats or barges were able to be used for the receipt or discharge of building materials at plaintiff's

piers and docks and, if so, the time when boats and barges could no longer be used for such purposes; whether at and since the time of acquisition of the property the piers and docks were or are in a useable condition; the period of time, if any, plaintiff utilized boats and barges for the above purposes and the difference in cost, if any, in now obtaining or making delivery of building materials by railroad or truck instead of by barges or boats; whether the property was subject to flood waters at the time of its acquisition or whether this is a new development; the manner and extent to which plaintiff's property is damaged and his business is disrupted by the alleged periodical floodings; and the nature and scope of the alleged depreciation in the value of the property alleged to have resulted from the actions of the respective defendants.

In the absence of any averments on the matters indicated above, the bill of complaint, on its face, fails to indicate any basis from which the Court could intelligently determine whether or not the jurisdictional amount is involved in the present controversy.

The insufficiency of plaintiff's bill of complaint to show that the jurisdictional amount is involved is aptly illustrated in LEITCH v. CITY OF CHICAGO ET AL. (C. C. A. 7th, 1930), 41 F. (2d) 728 (Certiorari denied 282 U. S. 891, 51 S. Ct. 106, 75 L. Ed. 786 (1930)). That case involved a suit to prevent the defendants from filling up a navigable stream on which plaintiff's land bordered. The bill contained a mere allegation by the plaintiff that his property was worth many times the jurisdictional amount of $3,000. The Circuit Court of Appeals sustained the decree of the District Court denying plaintiff's motion for a preliminary injunction and directed that the bill be dismissed for want of jurisdiction. In so doing the Court stated, at page 730:

> "* * * In appellants' motion for preliminary injunction it was stated that the land is worth many

times the jurisdictional amount of $3,000. This may well be true, and yet the value of the riparian rights, or the damage to the land by reason of filling up the stream, may be very little. Because of allegations in the bill that one time some boats ran on this water, and that railroads, stockyards, and factories are in the vicinity of the plaintiff's land, we cannot judicially assume that plaintiff's damage through the filling would be in excess of $3,000, nor indeed that the land will be damaged at all. From such allegations it cannot be assumed that the amount in controversy exceeds $3,000, any more than it may be concluded from statements of the opposing parties that this little stream, popularly known as "Bubbly Creek,' is a distinct detriment to the property abutting upon it, which would be greatly enhanced in value if the stream were filled."

**D.**

**Face of Complaint Reveals that Plaintiff is not Legally Entitled to any Equitable Relief or Damages; Therefore Jurisdictional Amount is not Present.**

In SAINT PAUL MERCURY INDEMNITY CO. v. RED CAB COMPANY, 303 U. S. 283, 58 S. Ct. 586, 82 L. Ed. 845 (1938), this Court had occasion to outline the law relating to the jurisdictional amount in cases of original jurisdiction and in removed cases. On the former point, Mr. Justice ROBERTS stated at pages 288-289:

> "* * * But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed. * * *"

An examination of the bill of complaint reveals to a legal certainty that plaintiff is not entitled to the equitable relief or monetary damages prayed for in the complaint. This is true for two reasons: (1) Plaintiff is seeking to enjoin an alleged public nuisance without showing that it has sustained special injury different in kind and degree from that suffered by members of the general public coming into contact with the nuisance; and (2) Plaintiff has failed to state a cause of action having regard to the law of Pennsylvania pertaining to the mining industry and the discharge of wastes from that industry into rivers and streams. Under these circumstances, there is no matter in controversy which has a value in excess of the jurisdictional sum.

(1) Plaintiff Is Seeking To Enjoin An Alleged Public Nuisance Without Showing Injury Peculiar To Itself.

The Circuit Court of Appeals conceded that the plaintiff had pleaded a public nuisance and that under the Pennsylvania law plaintiff had no standing to enjoin the same in the absence of any showing that plaintiff had suffered an injury different in kind and degree from that suffered by the general public coming into contact with the nuisance. The Circuit Court of Appeals held that plaintiff had made such a showing of special injury. However, petitioners submit that plaintiff has not made such a showing in view of the Pennsylvania decisions on the subject.

Plaintiff, in an apparent attempt to show special injury unto itself, avers that the culm deposits in the bed of the River adjacent to its property prevent boats being brought close enough thereto to enable materials used in plaintiff's business to be unloaded at its pier, and that as a result of storms the occasional overflow of the River at and along plaintiff's property results in great damage to such property and greatly disrupts plaintiff's business

(Paragraphs 5, 10, 12). However, the bill of complaint expressly avers that the waste materials are carried by the River through its entire length and affect in various ways and to various degrees all communities and their residents along the River (Paragraph 14). Clearly the type of injury alleged to be suffered by the plaintiff differs from that alleged to be suffered by other riparian owners only as to degree. Certainly it does not represent an injury dierent in kind from that alleged to be suffered by other coming into contact with the River. In other words, the plaintiff and all other persons or corporations along the River are similarly affected by the condition of the River resulting from the accumulated deposits of mine wastes and the respective injuries from this source undoubtedly vary only as to degree.

Even if the plaintiff was completely dependent upon the Schuylkill River to obtain building materials necessary for its business (which is not the case), plaintiff would not be entitled to maintain this action in its private capacity. This is clearly illustrated by the following case.

In THE BUCK MOUNTAIN COAL COMPANY v. THE LEHIGH COAL AND NAVIGATION COMPANY, 50 Pa. 91 (1865), the plaintiff filed a bill against the Lehigh Coal and Navigation Company to restrain it from neglecting to repair and put in operation its slack water navigation system which had been swept away by a flood on June 4, 1862. The plaintiff *was entirely dependent* upon the slack navigation system in order to get its coal to the market and alleged that it had suffered a loss of more than $50,000 as a result of the failure of Lehigh to restore its navigation system for a period of more than seven months after the flood. The plaintiff had constructed a railroad from its coal lands to its tract of land adjoining the navigable system which was also rendered useless. The lower Court dismissed the bill on the ground that the legislation pertaining to the navigation system prescribed a statutory remedy. On appeal the Supreme Court affirmed the dis-

missal of the bill but on the ground that the plaintiff, a private party, had no standing to abate a public nuisance, Mr. Justice Thompson stated, at page 99:

> "It seems to us they are not the proper parties to enforce this duty on part of the company to the public, in the absence of any *special injury* to themselves or property; and by this we mean, any injury, special in its operation, resulting from a failure to perform some specified duty to them, or to make compensation for injury and deterioration to their property, as contradistinguished from injury to them in common with the whole public, in the loss of a convenient and valuable highway.
>
> "There are many authorities in England and in this country which deny the right of private parties in their own names—in the absence of special laws—when their interests are only in common with the public, to compel the performance of a duty to the public. The reason is, that if one individual may interpose, any other may, and as the decision is one individual case would be no bar to any other, there would be no end to litigation and strife. The general laws of order so necessary to good government forbid anything like this."

Clearly, if the plaintiff in the above case was not entitled to maintain an action in its private capacity, the plaintiff in the present case has no better standing.

In Gold v. The City of Philadelphia, 115 Pa. 184 (1886), plaintiff instituted an action against the city to recover damages alleged to have been sustained by her by reason of the falling off in patronage at her inn through the negligence of the city in not repairing and keeping in passable condition the highway upon which it was situated. The evidence clearly showed that the city had been guilty of negligence in this respect. A judgment was entered in favor of the defendant in the

lower Court and this was affirmed by the Supreme Court. In so doing the Mr. Justice Paxson stated, at page 197:

> "The learned referee ruled this case upon the familiar and well settled principle, that one who is injured by a public nuisance, either in his person or in his property, cannot have his remedy by action, unless he can show a damage which is peculiar to himself, and different in kind and degree from and beyond that which is sustained by the general public.
>
> "The plaintiff contends that the referee erred in his application of this principle to the facts of her case. We do not think so. *The injury was one common to all persons who traveled on the road and who resided thereon.* The annoyance and inconvenience to some may have been much greater than to others, but it was of the same kind and differed only in degree." (Italics ours.)

In RHYMER v. FRETZ, 206 Pa. 230 (1903), the plaintiff sought to enjoin the defendant from enlarging a frame building across the street on the ground that the frame structure and the uses (gospel mission and saw mill) to which it was being put would endanger property in the vicinity from fire, and together with the gathering of disreputable persons in the neighborhood, would deprive the plaintiff and his neighbors from the full enjoyment of their property and home. The Court below granted the injunction. On appeal the Supreme Court reversed the lower Court's decision. In so doing, Mr. Justice Mestrezat stated, at page 233:

> "* * * In this averment there is no allegation that by the construction and use of the building the plaintiff will sustain any damage special to himself, or that his property will be subjected to any other or greater danger than that of his neighbor. The danger from fire and the deprivation of the enjoyment and use of property are, therefore, as alleged

in the bill, common to all the property and persons residing in the vicinity of the proposed structure. The anticipated injury or damage to the property of the plaintiff by the erection of the building will be the same in character and degree as that which will result to the property of every other person in the neighborhood. * * *"

The Circuit Court of Appeals took the position that the case of KNOWLES v. PENNSYLVANIA RAILROAD COMPANY, 175 Pa. 623 (1896), represents the present Pennsylvania law on this subject. However, petitioners point out that in that case the plaintiff was able to show an injury different in kind and degree from that suffered by other persons coming into contact with the alleged nuisance.

In the present case the annoyance and inconvenience of defendants' alleged actions to some members of the public may be much greater than to others, but it is of the same kind and differs only in degree. The plaintiff and all riparian owners and the general public are allegedly precluded from enjoying or benefiting from the navigation of the River. This is equally true at low water or during flood waters. Also, flood waters affect the riparian owners and the general public in various degrees but the annoyance and inconvenience is of the same kind and stems from the same source.

(2) PLAINTIFF HAS FAILED TO SHOW A CAUSE OF ACTION WHICH WOULD ENTITLE IT TO EQUITABLE RELIEF OR MONETARY DAMAGES.

Having regard to the decisional and statutory law of Pennsylvania relative to the mining industry, it is apparent to a legal certainty from the face of the bill of complaint that plaintiff would not be entitled to the equitable relief or the monetary damages sought in its prayer for relief.

By its decision in the leading case of THE PENNSYLVANIA COAL COMPANY v. SANDERSON, 113 Pa. 126, 6 Atl. 453 (1886) (three Justices dissenting), the Supreme Court

of Pennsylvania has limited the application of the maxim, *sic utere tuo ut alienum non laedos,* which is generally observed, in favor of the proposition that harm caused to one land owner by another as the necessary and unavoidable result of a natural use of his land by the latter, without negligence or malice, is *damnum absque injuria.*

The Supreme Court of Pennsylvania in denying plaintiff relief stated, at page 146:

> "The defendants, being the owners of the land, had a right to mine the coal. It may be stated, as a general proposition, that every man has the right to the natural use and enjoyment of his own property, and if whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria,* for the rightful use of one's own land may cause damage to another, without any legal wrong.
>
> "Mining in the ordinary and usual form is the natural user of coal lands; they are, for the most part, unfit for any other use. 'It is established,' says Cotton, *L. J.,* in West Cumberland Iron Co. *v.* Kenyon, 11 L. R., 6 Ch. Div., 773, 'that taking out mineral is a natural use of mining property, and that careful, proper mining operations.' In the same case Brett, *L. J.,* says: 'The cases have decided that where that maxim *(sic utere tuo ut alienum non loedas)* is applied to landed property, it is subject to a certain modification; it being necessary for the plaintiff to show, not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land.' L. R., 11 Ch. Div., 787.
>
> "The right to mine coal is not a nuisance in itself: It is, as we have said, a right incident to the ownership of coal property, and when exercised in the ordinary manner, and with due care the owner cannot be held for permitting the natural flow of

mine water over his own land, into the water course, by means of which the natural drainage of the country is effected."

In subsequent decisions, it was held that persons engaged in the mining industry are required to use known appliances and methods to prevent as far as possible the discharge of mine waste into the streams. See HARVEY v. SUSQUEHANNA COAL COMPANY, 201 Pa. 63 (1902); ELDER v. LEICHENS COAL COMPANY, 157 Pa. 490 (1893).

Accordingly, under the law of Pennsylvania, the defendants in carrying on their business of mining are under the duty to use the most effective and approved known methods of appliances to minimize the discharge of mine wastes into the River or its tributaries; and if some of the mine wastes escape into the River with injurious results despite such precautionary measures, no lack of care can be imputed to the defendants and any damages resulting therefrom are *damnum absque injuria*.

There is legislative recognition that some amount of mine wastes will still escape into the nearby streams notwithstanding presently known methods of prevention.

The Act of June 22, 1937, P. L. 1987, 35 P. S. Sec. 69.1 *et seq.* relates generally to the pollution of waters of the Commonwealth. Article III of the Act relates to pollution by industrial wastes and generally prohibits the discharge of industrial wastes into the waters of the Commonwealth. Section 310, P. S. Sec. 691.310, provides as follows:

> "* * * The provisions of this article shall not apply to acid mine drainage and silt from coal mines until such time as, in the opinion of the Sanitary Water Board, practical means for the removal of the polluting properties of such drainage shall become known."

Plaintiff, in its prayer for relief, seeks to have the defendants (*a*) perpetually enjoined from discharging any mine wastes whatsoever into the Schuylkill River or its

tributary streams or upon any land adjacent thereto where the waste materials can or may be washed into the River or its tributaries and (*b*) required to take adequate measures and precautions to prevent erosion or escape into the Schuylkill River or its tributary streams of existing deposits of mine wastes.

This, as we have shown, raises too high a standard of care on the part of the defendants under the Pennsylvania law. If defendants were to be enjoined from doing anything which might result in any mine wastes *whatsoever* ultimately entering the River or its tributaries, they would have to cease doing business until some means or methods became known whereby no particle of mine waste could possibly enter the River or its tributaries. This would result in defendants being deprived entirely of the natural use of their lands which would be contrary to Pennsylvania law.

Moreover, the equitable relief sought with respect to the past and future deposits of mine wastes upon land adjacent to the River raises too high a standard of care. Under the Elder case, *supra*, the defendants may deposit culm and refuse from their mines on their own lands where such deposits will be safe from encroachment by ordinary floods. If an extraordinary flood should reach and carry away any portion of such deposits, there would be no liability for damages sustained by any lower riparian owners. However, the injunctive relief sought would require defendants to take precautionary measures to prevent any erosions of such deposits under any circumstances. Also, there is no showing by plaintiff that there are known practicable means whereby this can be done.

Accordingly, it is clear to a legal certainty that plaintiff is not entitled to the broad equitable relief set forth in its prayer.

Likewise, plaintiff is not entitled to the monetary damages prayed for in its bill of complaint.

Under the law of Pennsylvania, as we have shown above, mining coal and discharging and depositing the

mine wastes incident thereto is not *per se* willful, negligent, wanton, reckless or unlawful. Such mining, discharge and deposit becomes unlawful only if conducted without taking those methods which could be taken or used to prevent or minimize damage to others.

Plaintiff, in its bill of complaint, avers in very general terms that the defendants are utilizing various systems of cleaning coal whereby mine wastes are willfully, negligently, wantonly, reckless and unlawfully discharged into the Schuylkill River or its tributary streams (Paragraph 7); and that defendants in the course of their past operations have accumulated large deposits of mine wastes on their lands adjacent to the River and its tributaries which they have negligently, recklessly, willfully and wantonly failed to properly secure, enclose, hold or otherwise stabilize to prevent erosion into the River and its tributaries (Paragraph 9).

Having regard to the decisional and statutory law of Pennsylvania relating to the mining industry, it is at once apparent that the plaintiff by the above generalizations has failed completely to state any ultimate facts whatsoever from which this Court could properly reach the conclusion that the defendants have been or are guilty of a condition which can properly be described as willfull, negligent, reckless, wanton and unlawful.

In the absence of the specification of the respects in which it is claimed that each of the several defendants have failed to adopt available measures to minimize the effect of their operations on subjacent properties, the plaintiff has not made out a cause of action.

What we have said above applies equally to the deposits of mine wastes which plaintiff, in Paragraph 9 of its complaint, avers have accumulated upon the lands of the defendants "in the course of their past operations."

In the absence of the ultimate facts referred to above, plaintiff's complaint in substance amounts to nothing more than an imputation of negligence, etc. against the defendants merely because some mine wastes ultimately

find their way into the Schuylkill River and its tributaries. This, as we have shown, raises too high a standard of care on the part of the defendants under the Pennsylvania law.

Plaintiff's complaint contains no averment that the mine wastes have been deposited on its property with resulting damage. It is true that in Paragraph 10 it is stated that the mine wastes have been and are being carried down the stream by the flow of the river "to and upon the premises of the plaintiff"; however, there is nothing in the complaint to indicate just what the plaintiff means by the term "upon the premises".

It would appear that plaintiff is referring to the bed of the stream adjacent to its property because plaintiff states in Paragraph 10 that the mine wastes are destroying the value of the river for navigation and "the value of plaintiff's property for the receipt and discharge of building materials transported by boats or barges".

Accordingly, plaintiff has not stated a cause of action in this respect, particularly so as the title to the bed of the stream adjacent to plaintiff's property is in the Commonwealth of Pennsylvania. PHILADELPHIA v. PHILADELPHIA SUBURBAN WATER CO., 309 Pa. 130 (1932).

In view of the fact that it is clear from the face of the complaint that plaintiff would not be entitled to either the equitable relief or the monetary damages it seeks, there can be no jurisdictional amount involved in the present case.

Therefore it is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that a Writ of Certiorari should be issued.

Respectfully submitted,

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## INDEX TO BRIEF.


| | Page |
|---|---|
| I. Counter-Statement of Questions Involved ..... | 1 |
| II. Counter-Statement of the Case ..... | 2 |
| III. Argument for the Respondent ..... | 5 |
| Introductory Statement ..... | 5 |
| A. The Protection of Property Rights Is the Matter in Controversy ..... | 6 |
| B. Defendants Were Properly Joined in One Action and the Jurisdictional Amount Was Shown as to Each ..... | 12 |
| C. Federal Jurisdiction Was Adequately Shown. | 18 |
| D. The Bill of Complaint States a Cause of Action ..... | 22 |
| 1. Special Damage Is Shown ..... | 22 |
| 2. Unlawful Mining Is Alleged ..... | 25 |
| Conclusion ..... | 30 |

## TABLE OF CASES CITED.


Page

Buck Mountain Coal Co. v. Lehigh Coal & Navigation Company, 50 Pa. 91 (1865) ..... 23

Clark v. Paul Grey, 306 U. S. 583 (1939) ..... 19

East Broadtop Transit Company v. Flood, 326 Pa. 353 (1937) ..... 15

Eckman v. Lehigh & Wilkes-Barre Coal Company, 50 Pa. Super. 427 (1912) .....12, 18

Elder v. Lykens Valley Coal Co., 157 Pa. 490, 497 (1893) ..... 28

Fricke v. Quinn, 188 Pa. 474, 482 (1898) ..... 7, 8

Gallagher v. Kemmerer, 144 Pa. 509 (1891)....12, 16, 17, 18

Gold v. The City of Philadelphia, 115 Pa. 184 (1886).. 24

Gray v. Philadelphia & Reading Coal & Iron Co. et al., 286 Pa. 11 (1926) .....13, 14

Harvey v. Susquehanna Coal Co., 201 Pa. 63, 66, 67 (1902) ..... 27

Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335, 342 (1862) ..... 7, 8

Knowles v. Penna. Railroad Co., 175 Pa. 623 (1896).. 23

Leitch v. City of Chicago et al. (C. C. A. 7th, 1930), 41 F. (2d) 728 ..... 22

Little Schuylkill Navigation, Railroad and Coal Company v. Richard's Administrator, 57 Pa. 142 (1868) .....12, 16, 17, 18, 19

McNutt, Governor of Indiana v. General Motors Acceptance Corp., 298 U. S. 178, 56 S. Ct. 780, 80 L. Ed. 183 (1936) .....10, 11, 19

Miles Laboratories, Inc. v. Seignious, No. 981, 30 F. Supp. 549 (District Court, E. D. South Carolina) 1939 ..... 20

Penna. Coal Co. v. Sanderson, 113 Pa. 126, 6 Atl. 453 (1886) ..... 25

Pennsylvania R. R., et al. v. Sagamore Coal Co., et al., 281 Pa. 233, 248, 249 (1924) ..... 26

Philadelphia v. Philadelphia Suburban Water Co., 309 Pa. 130, 150 (1932) ..... 23

## TABLE OF CASES CITED (Continued).


| | Page |
|---|---|
| Rhymer v. Fretz, 206 Pa. 230 (1903) | 24, 25 |
| Robertson v. Coal Co., 172 Pa. 566 (1896) | 25 |
| Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540 (1904) | 26 |
| Venzel v. Valley Camp Cola Co., 304 Pa. 583 (1931) | 27 |


## AUTHORITIES AND STATUTES.


| | Page |
|---|---|
| Goodrich-Amram Procedural Rules Service, Sec. 2229. | 15 |
| Rule 20 (a) of the Federal Rules of Civil Procedure, entitled "Permissive Joinder" | 15 |
| 1 Moore's Federal Practice | 11 |
| 17 Purdons Pa. Statutes, Sec. 61 | 15 |

## I.

## COUNTER-STATEMENT OF QUESTIONS INVOLVED.

Where a Delaware corporation, lower riparian owner of land containing a pier and docks, brings a joint action, equitable in nature, praying for an injunction and proportionate assessment of damages, against sixteen Pennsylvania corporations, upper riparian owners of mining lands and collieries, alleging continuing trespasses arising from the negligent, reckless, wilful and wanton discharge of coal dirt, silt and other refuse materials into the river and its tributaries, which are then carried to and upon plaintiff's land, causing great damage to plaintiff's property, curtailing its lawful uses, greatly disrupting plaintiff's business, and threatening permanent injury and damage to plaintiff, and further alleging that the amount in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars, is there, under all the facts and reasonable inferences, a sufficient showing of federal jurisdiction?

(The Circuit Court of Appeals answered in the affirmative, and reinstated the bill of complaint.)

## II.

## COUNTER-STATEMENT OF THE CASE.

Petitioner's statement of the matter involved does not enumerate all the facts pleaded in the bill of complaint, nor conform to the exact sequence thereof. Respondent believes that such incompleteness requires some counter-statement of the facts.

The bill of complaint, together with its prayer for equitable relief, appears fully in the Record at pages 3a to 7a, inclusive. Paragraph 5 avers that building materials normally could be brought by boat to plaintiff's property, but culm deposits in the bed of the Schuylkill River, adjacent to plaintiff's property, prevent this. It is charged in paragraph 7 that defendants use large quantities of water to clean coal and then negligently and unlawfully discharge such water, heavily polluted with coal wastes, into the Schuylkill River or its tributary streams. It is further alleged that defendants deposit in the river or its tributaries, and upon the banks thereof, large quantities of coal dirt and other refuse from their mines, collieries, washeries and plants (par. 8); and have accumulated large culm and refuse piles which they have negligently, recklessly, wilfully and wantonly failed to secure against erosion and consequent pollution of the Schuylkill River and its tributary streams (par. 9).

It is charged in paragraph 10 that the culm and mining wastes so discharged into, and so allowed to enter the Schuylkill River and its tributaries, are carried to and upon the premises of the plaintiff, and are destroying the value of the river for navigation and the value of the plaintiff's property for the receipt and discharge of building materials by boats or barges. It is averred in paragraph 12 that the discharge of such materials has so raised the bed of the river that whenever there is any appreciable increase in the quantity of water in the river it overflows its banks at

and along plaintiff's property and results in great damage to the plaintiff's property and greatly disrupts plaintiff's business. Paragraph 13 avers that the acts in question are in violation of certain federal statutes, and paragraph 14 alleges that they constitute a nuisance.

In paragraphs 15 and 16 of the bill the plaintiff avers that defendants' actions in these respects are a continuing trespass which constantly increases the deposits in the river and threatens to make permanent the injury and damage to plaintiff; and that, by reason of such improper acts of the defendants, plaintiff has suffered large and irreparable damages through the permanent depreciation of the value of its property and through the curtailment of the lawful uses to which the property might be put by plaintiff.

The bill asks for equitable relief and, more particularly, for a permanent injunction against the discharge of waste material into the Schuylkill River, or its tributary streams; that the defendants be required to take adequate measures and precautions to prevent the escape of such waste materials; that the damages sustained by plaintiff be ascertained and assessed against each defendant in proportion to its contribution to the injury; that defendants pay to the plaintiff all costs necessary to restore the channel of the Schuylkill River adjacent to plaintiff's property; that defendants pay to the plaintiff the costs of the action, and that there be such other and further relief as the court may deem proper.

In some respects petitioner's statement of the case tends to be argumentative. For instance, it advances the conclusion that the bill of complaint has aggregated claims against the several defendants for the purpose of showing the jurisdictional amounts (p. 3). Also, a certain amount of argument, appears in petitioners' treatment of the motion to dismiss the complaint. Since these matters will be met in respondent's argument, they need not be elaborated upon at this point.

The exact grounds of defendants' motion to dismiss appear in the Record, at pages 8a to 10a, inclusive. They are also considered in respondent's argument and need not be repeated here.

Respondent believes that the decision of the Circuit Court of Appeals (20 to 30) fully passes upon all the contentions raised by defendants.

## III.

## ARGUMENT FOR THE RESPONDENT.

### Introductory Statement.

Respondent's reply to the Petition for Writ of Certiorari and to Petitioners' Brief resolves itself into four categories, following the sequence of the matters to which petitioners state their argument would be directed. Consequently, respondent's argument covers the following matters:

(1) The protection of property rights is the matter in controversy.

(2) Defendants were properly joined in one action and the jurisdictional amount was shown as to each.

(3) Federal jurisdiction was adequately shown.

(4) The bill of complaint states a cause of action.

As respondent views the matter, the gist of the action is the invasion of its property rights and the protection sought against such trespass. Since it is alleged that riparian rights are being invaded by trespasses of a continuing and permanent character, the action to restrain is equitable in nature and the jurisdictional amount should be calculated on the basis of the property right which is being injured. The allegation of the first paragraph of the bill of complaint that the amount in controversy exceeds $3,000 must necessarily relate to the property right in question. The Circuit Court of Appeals has so found and its decision is in accord with the facts of the case and the law as established by this Court.

Defendants were properly joined in one action under both Pennsylvania and Federal practice. The action is equitable in character and asks that money damages be ascertained and assessed against each defendant in proportion to its contribution to plaintiff's injury. When its jurisdiction once attaches, equity may decide every other con-

tention connected with the subject matter of the suit, including the ascertainment and assessment of damages. The Circuit Court of Appeals therefore did not err in regarding the damage allegations as being collateral to the bill's main purpose. The amount in controversy is not determined by any tort liability but by the main purpose of the bill, which is to remove the continuing trespass to plaintiff's property. The allegation that the amount in controversy exceeds the jurisdictional amount applies to the value of the property rights and is necessarily effective against each of the defendants.

The amount of monetary damages which may be recoverable is not the test of jurisdiction. In an action of this kind the invasion of a right, equal in value to the jurisdictional amount, even if otherwise not accompanied by monetary damages, is sufficient to invoke the equitable power of the court and an injunction may clearly issue to prevent future wrong.

Plaintiff has shown special damages, and the cases cited by petitioners on the subject of nuisances and on the law applicable to the mining industry in Pennsylvania do not impair the validity of the complaint nor disclose any error in the opinion of the Circuit Court of Appeals.

In the foregoing respects this brief presents respondent's argument that the decision of the Circuit Court of Appeals is entirely proper under the facts and the law and that no writ of certiorari should be issued.

## A.

## The Protection of Property Rights Is the Matter in Controversy.

The nature and object of plaintiff's action clearly appears from the bill of complaint. Plaintiff is a lower riparian owner, and the defendants are upper riparian owners. Plaintiff charges the defendants with conducting their mining operations in a negligent manner and with unlawfully discharging quantities of waste materials into

the stream. It is alleged that these waste materials are carried down stream to and upon the premises of the plaintiff, and further that they cause the stream to overflow at and along plaintiff's property. There are also averments of damage to the plaintiff's property and of disruption to its business. The bill avers that defendant's actions constitute a continuing trespass which constantly increases the deposits in the bed of the river and thus threatens to make permanent the injury and damage to the plaintiff; and that, by reason of such improper acts of the defendants, the plaintiff has suffered large and irreparable damages through the permanent depreciation of the value of its property and through the curtailment of the lawful uses to which plaintiff might put the property. An injunction is prayed for, together with other appropriate relief.

The opinion of the Third Circuit Court of Appeals, by McLaughlin, Circuit Judge, aptly sums up the cause of action in a few words—"the hard core of plaintiff's suit is the invasion of its property right and the sought for protection against such trespass." (24)

Plaintiff, as a riparian owner, obviously has a right to have the Schuylkill River reach its property in the stream's natural state, without being polluted by the acts of the defendants. See:

*Fricke v. Quinn*, 188 Pa. 474, 482 (1898);
*Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335, 342 (1862).

In the *Fricke* case Mr. Justice Mitchell said, at page 482:

> "* * * It is the right of the riparian owner to have the natural flow of the stream reach his land in its natural channel, and in its natural condition. An averment that the channel is filled up or diverted, its bed raised so as to obstruct its current, and prevent drainage into it, is an averment of unlawful interference with complainant's rights."

An injunction was awarded in the *Fricke* case, jointly to Christian Fricke and to the Borough of Port Carbon, on findings that the defendants, coal operators, had polluted the water and filled up the channel of Mill Creek (a tributary of the Schuylkill) not by the ordinary exercise of riparian rights, but by excessive and unlawful acts in the mining and washing of coal, to the injury of the complainants as lower riparian owners.

The opinion in the *Holsman* case, supra, states that "Every owner of land, through which a stream of water flows, is entitled to the use and enjoyment of the water, and to have the same flow in its natural and accustomed course, without obstruction, diversion or pollution."

Plaintiff in the instant case has all the rights of a riparian owner. Manifestly, such rights are not limited to taking water for domestic use, for instance, but are broad enough to include maintenance of a pier and docks and in all other respects to occupy, use and enjoy the property without unlawful interference by the defendants.

Plaintiff's riparian rights are being invaded by trespasses which are alleged to be of a continuing and permanent character. The action to restrain such invasion is equitable in its nature. Under such circumstances, the averment of paragraph 1 of the bill of complaint that the amount in controversy exceeds three thousand dollars, exclusive of interests and costs, necessarily relates to the value of plaintiff's property rights.

Defendants, on the other hand, have never asserted that the value of plaintiff's riparian property rights does not exceed the jurisdictional amount. The basis upon which they challenge the existence of federal jurisdiction will be found in their motion to dismiss the bill of complaint (8a to 10a). Briefly stated, their grounds of objection are: 1. Plaintiff has no standing to abate what defendants say amounts to a public nuisance; 2. if a joint tort is alleged the complaint is not good in law; 3. if separate torts are alleged the complaint fails to aver facts from which the

conclusion can be derived that as to each defendant there is a controversy between it and the complainant which exceeds the jurisdictional amount; 4. there is no showing that between the date plaintiff acquired its property and the date of the filing of the complaint the condition of the Schuylkill River adjacent to plaintiff's property in any wise changed; and 5. the complaint is too general in describing the conduct which it alleges is unlawful.

It is evident that the defendants' approach to the subject of jurisdictional amount has been that it is incumbent upon the plaintiff to establish a money claim for $3,000. damages *in tort* against each defendant. The District Court upheld the defendants' contention in this respect. It regarded the proceeding as being essentially a group of separate tort actions, and looked only for monetary claims against single defendants in excess of the jurisdictional amount. (See 17a.)

The Third Circuit Court of Appeals, in reversing the District Court, adopted the plaintiff's contention that the action is a bill in equity for an injunction, wherein the recovery of monetary damages against any single defendant is merely incidental to the principal matter in controversy, which is the protection of plaintiff's property rights by the removal of continuing trespasses thereto. In its opinion, the Circuit Court of Appeals says on this point: "Protection of that right both now and in the future is prayed for. *That is the controversy the amount of which plaintiff in the first paragraph of the bill of complaint says exceeds $3,000.* Later on plaintiff will have to substantiate that allegation but at this time we are not concerned with the trial proof" (27, 28). (Emphasis supplied.)

Defendants say that the Circuit Court of Appeals was in error in reaching such a conclusion. In the Petition for Writ of Certiorari, under the heading "Reasons Relied Upon for Allowance of Writ", at pages 8 and 9, petitioners characterize as "wholly unwarranted" a statement of the Circuit Court of Appeals distinguishing cases involv-

ing injunctions against public acts. Petitioners assert that "the public interest requires a clarification of this uncertainty, in so far as jurisdictional amount is concerned in injunction cases." We feel confident that such an allegation will not move this Court, in the exercise of sound judicial discretion, to grant a review on Writ of Certiorari.

In their brief before the Circuit Court of Appeals (pp. 4, 5), petitioners stated that "Where injunctive relief is sought, the more recent decisions hold that the test for determining the jurisdictional amount is the damage suffered by the alleged invasion of the right sought to be protected and not the value of the right itself."[1] The Circuit Court of Appeals examined the cases cited by defendants in support of such statement but did not find therein any conflict with the Court's own statement of the rule that "It is well settled that in an action of *this nature,* the jurisdictional amount is to be calculated on the basis of the property right which is being injured." (24) (Emphasis supplied). The Circuit Court of Appeals said that certain recent opinions of this Court do not conflict with the rule stated by the Circuit Court *as applicable to the instant facts,* and then went on to state that "Those decisions indicate that in cases concerning injunctions against public acts, the recent trend of the United States Supreme Court has been to narrow its construction of the jurisdictional amount in controversy." (26, 27.)

Obviously, there are differences between private acts and public acts, and such differences necessarily cut down and qualify the broad proposition sought to be advanced

[1] In support of such statement defendants cited McNutt, Governor of Indiana v. General Motors Acceptance Corp., 298 U. S. 178, 56 S. Ct. 780, 80 L. Ed. 183 (1936); Kvos, Inc. v. Associated Press, 299 U. S. 269, 56 S. Ct. 197, 81 L. Ed. 183 (1936); Gibbs, Attorney General, et al. v. Buck, 307 U. S. 66, 59 S. Ct. 725, 83 L. Ed. 1111 (1939); Allison v. Great Atlantic and Pacific Tea Company (C. C. A. 4th, 1938), 99 F. (2d) 507; Leitch v. City of Chicago et al. (C. C. A. 7th 1930), 41 F. (2d) 728.

by the petitioners. The subject of the amount in controversy in injunction actions is taken up in 1. *Moore's Federal Practice,* where the author handles separately injunctions against private acts (page 530) and injunctions against public acts (page 534). In discussing injunctions against public acts, concerning the amount in controversy in state licensing cases, Moore says, at page 536:

> " * * * a few recent decisions of the Supreme Court clearly indicate the scope of the Court's present and probable future position to be more restricted on amount in controversy in cases concerning injunctions against public acts. The Court's position is explainable on the seemingly politic desire to keep the hands of the federal courts out of the internal affairs of the state as much as possible."

It was well within the province of the Circuit Court of Appeals to distinguish the cases cited by the defendants as not applicable to the instant facts. Moreover, there does not appear to be in *McNutt v. General Motors Acceptance Corp.,* 298 U. S. 178 (1936) any opposition fundamentally to the rule that jurisdiction is to be tested by the value of the object or the right to be protected against interference. In the McNutt case the lawfulness of a state regulation was in question. The object to be protected was the right to be free of such regulation. Apparently a proper way to determine the value of such a right was to measure the loss which would follow the enforcement of the regulation. In the instant case, however, there is involved alleged repeated acts of trespass by private parties, which, if unchecked, will prolong serious interference with the occupancy and enjoyment of plaintiff's rights as a riparian owner. As the Circuit Court of Appeals stated the matter: "In this appeal we are not dealing with the taxing or regulatory authority of a state, but with a continuing trespass by private corporations directly affecting plaintiff's right to occupy and enjoy its property and to function as a business organization." (27)

The decision of the Circuit Court of Appeals in the instant case is entirely warranted, under the facts and the law, and does not create the uncertainty concerning jurisdictional amount in injunction cases which the petitioners allege.

**B.**

**Defendants Were Properly Joined in One Action and the Jurisdictional Amount Was Shown as to Each.**

Under Pennsylvania law and equity, upper riparian owners charged with violating the rights of a lower riparian owner may be joined in a single action, and this is particularly so where an injunction is sought against trespasses or nuisances of a continuing and permanent character.

When the District Court dismissed the complaint, it based its conclusion with respect to Pennsylvania law upon the following cases:

*Little Schuylkill Navigation, Railroad and Coal Company v. Richard's Administrator,* 57 Pa. 142 (1868);
*Gallagher v. Kemmerer,* 144 Pa. 509 (1891);
*Eckman v. Lehigh & Wilkes-Barre Coal Company,* 50 Pa. Super. 427 (1912).

These three decisions were written in the light of the practice which ante-dated current concepts and rules relating to the joinder of parties. Also, the three cases deal with attempts to impose a liability against, or to escape liability by, a single coal company for the deposit of culm and refuse by all the coal companies in a particular district, although operating separately and independently of each other. The instant case attempts no such result.

Under modern practice, the instant plaintiff proceeds against various defendants in one action, but asks equitable relief against them, and incidental thereto requests the assessment of the damage caused by each defendant in proportion to its own contribution to the plaintiff's injury. The joinder of the defendants in one action conforms to both

Pennsylvania and federal practice, but in asking damages plaintiff does not seek to impose upon the defendants any liability greater than that recognized by the appellate courts of Pennsylvania.

Plaintiff's case resembles *Gray v. Philadelphia & Reading Coal & Iron Co. et al.*, 286 Pa. 11 (1926). There a bill in equity was filed against several coal companies, alleging that the material deposited by each defendant is not separate and distinguishable, thus making the injury and damage to the plaintiff the single united and combined acts of all the defendants. An injunction was asked against all with an award of appropriate damages against each. Objections were interposed to the bill, and the lower court dismissed the action. On appeal, the Pennsylvania Supreme Court reversed the lower court and reinstated the bill. The opinion by Mr. Justice Simpson states, at page 15:

> " * * * Unlike an action at law, in equity an agreement for a concert of action is not essential to jurisdiction; a single result brought about by the acts of many defendants, even though 'having no connection with each other', is, as the citation shows, sufficient to maintain the jurisdiction, and to defeat the claim of multifariousness . . . "

The said Court further stated, at page 16:

> "* * * Equity is the special forum for obtaining an injunction, which may be granted to prevent actual or threatening trespasses or nuisances of a continuing and permanent character (Kepple v. Lehigh Coal and Navigation Co., 200 Pa. 469; Kramer v. Slattery, 260 Pa. 234; and, when once the jurisdiction has thus attached, equity will itself proceed to round out the whole circle of controversy, by deciding every other contention connected with the subject-matter of the suit, including the amount of damages to which plaintiff is entitled because of injuries theretofore sustained:

Allison & Evans' App., 77 Pa. 221; Walters v. McElroy, 151 Pa. 549; State Hospital for Criminal Insane v. Consolidated Water Supply Co., 267 Pa. 29; Epstein v. Ratosky, 283 Pa. 168."

In the light of the *Gray* decision, there is absolutely no merit in the position asserted by petitioners, at page 18 of their brief, that "The Circuit Court of Appeals was clearly in error in holding that the legal actions for damages were incidental to the equitable relief sought by the plaintiff." Respondent has not seen fit to combine legal actions with an equitable action, as the petitioners contend. It has brought an equitable action only, wherein a court of equity is asked to restrain illegal acts in the future, and in devising its remedy to decide any damages to which plaintiff may be entitled because of the injuries already sustained.

Petitioners are mistaken when they say that the Circuit Court of Appeals refused to hold that the plaintiff was required to show the existence of the jurisdictional amount with respect to each defendant. Since the amount in controversy, which is the value of the property rights being injured, is alleged to be in excess of the jurisdictional amount, the jurisdictional amount is consequently shown with respect to each defendant. Petitioners' confusion on this score results from their persistence in wanting to view the action as a consolidation of separate suits in tort. They say at page 19 of their brief that the plaintiff in its Brief filed with the Circuit Court of Appeals (p. 14) admitted that the averment of jurisdictional amount does not indicate that the plaintiff has a claim for monetary damages in excess of three thousand dollars ($3,000.) against each individual defendant. But the same brief continues to point out (p. 15) that, in any event, it is not such damages that are in controversy, but rather the invasion of plaintiff's rights that is involved; and that, hence, the value of the right to be protected must provide the test of jurisdiction.

The Pennsylvania cases cited by the District Court were adjudicated prior to the adoption of remedial legisla-

tion in Pennsylvania, authorizing the bringing in of additional defendants. Under such legislation the Pennsylvania Supreme Court has held that there is no objection to a plaintiff joining several defendants in one action, whatever the basis of their respective liabilities. See *East Broadtop Transit Company v. Flood*, 326 Pa. 353 (1937).

Subsequent legislation authorized the Pennsylvania Supreme Court to prescribe rules of practice and procedure (1937, June 21, P. L. 1982; 1939, March 30, P. L. 14; 17 P. S. Sec. 61). Pursuant thereto Rule 2229, relating to Permissive Joinder, was adopted, providing:

> "(b) A plaintiff may join as defendants persons against whom he asserts any right to relief jointly, severally, separately or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences if any common question of law or fact affecting the liabilities of all such persons will arise in the action." (Goodrich-Amram Pennsylvania Procedural Rules Service, 2226 to 2250, page 30.)

The federal rule is to the same effect. Rule 20 (a) of the Federal Rules of Civil Procedure, entitled "Permissive Joinder", provides that:

> "All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all of the relief demanded."

The historical background of the Pennsylvania rule is considered in Goodrich-Amram Procedural Rules Service, Sec. 2299 (b)-1, page 42, where it is observed with respect to prior practice that: "In the field of tort law, if the inde-

pendent and unconcerted acts of several persons harmed the plaintiff, he had to sue them separately unless the doctrine of concurrently negligent tort feasors was applicable.[4] The fact that it may have been difficult to apportion to each tort feasor the harm done by him to the plaintiff did not warrant a departure from this rule.[5] " In the footnote designated "5", the authors cite the *Gallagher* and *Little Schuylkill* cases, supra.

In tracing the course of remedial legislation in Pennsylvania, Goodrich and Amram observe, at page 44:

> "• • • The right of joinder of defendants in trespass actions was extended by the development of the principle that where a tort is committed by one or more persons with the aid or at the direction of others or through the concerted action of several persons;[14] or if the concurrent negligence of several persons produces injury to the plaintiff *all such persons are regarded as jointly and severally liable for the purposes of joinder.*[15] " (Emphasis supplied.)

Under a discussion of the kinds of joinder permitted, Section 2229 (b)-3, page 47, the same authors state:

> "*The owners of upper riparian lands who violate the rights of a lower riparian owner may be joined in a single action.*[10] (Emphasis supplied.)

Footnote "10" relates that the prior practice was to the contrary, citing *Gallagher v. Kemmerer* and *Little Schuylkill Navigation R. & Coal Co. v. Richards,* supra.

An examination of the three Pennsylvania cases cited in the District Courts' opinion will be of assistance in demonstrating that the incidental damages sought in the instant action do not contemplate any greater liability than was applied in such cases.

The *Little Schuylkill* case was an action of trespass on the case. A mill dam had become filled with coal dirt washed downstream from mines belonging to different owners and

operating independently of each other. The effect of a judgment for the plaintiff was to hold one defendant liable for the combined result of all the deposits. The Pennsylvania Supreme Court held that without concert of action no joint suit could be brought against the owners of all the collieries. The difficulty of determining how much dirt came from each colliery was not thought to be a good reason for holding one man liable for the torts of others without concert. But the Court did observe that the *relative proportions* thrown in by each company may form some guide for a jury to measure the injury.

In so far as the *Little Schuylkill* case relates to the joinder of defendants in one action it is no longer the law in Pennsylvania. With respect to the recovery of damages, the instant plaintiff does not seek to hold any one company liable for the torts of the others without concert. The instant plaintiff has alleged a commingling of culm so that "thus the injury and damage to the plaintiff is brought about by the united and combined acts of the defendants" (5a). However, in asking relief, plaintiff prayed that damages "be assessed against each defendant in proportion to his contribution to the plaintiff's injury or damage as determined by this Honorable Court" (7a).

The *Gallagher* case involved a trespass action for the damage caused Gallagher's lands by refuse, culm and dirt washed upon it from the coal mines operated by defendant on land above. The defendant argued that because the plaintiff had already settled with another mine operator for damage to the land there was an accord and satisfaction for the whole damage, since it was impossible to separate and ascertain the proportion of damage caused by each. The Pennsylvania Supreme Court held that this branch of the action was ruled by the *Little Schuylkill* case. There is nothing here at variance with the instant action. In fact, the *Gallagher* case lends support to the assessment of damages against each defendant in proportion to its contribution to the damage.

In the *Eckman* case, a judgment was recovered against the Lehigh & Wilkes-Barre Coal Company for damage caused by the deposit of culm on plaintiff's land. While there was evidence that culm came from defendant's collieries, there was also evidence that it was commingled with culm brought in the same way from other collieries. The appellate court cited among others, the *Little Schuylkill* and *Kemmerer* cases, and the judgment was affirmed.

When the three cases are viewed in the light of the present procedure governing the joinder of parties, it becomes apparent at once that the instant plaintiff's joint action, followed by its prayer for a separate assessment of damages against each defendant, fully harmonizes with Pennsylvania law.

Plaintiff's action does not involve an aggregation of distinct claims against different parties for the purposes of enlarging jurisdiction. The amount in controversy is not determined by any several tort liability; it is determined by the main purpose of the bill, which is to remove a continuing trespass to plaintiff's property.

It is the plaintiff's property rights which are in controversy, and since the amount in controversy is alleged to exceed the jurisdictional amount, the allegation is necessarily effective against each of the defendants. The nature and object of the action and the purposes sought to be accomplished give meaning and content to the jurisdictional allegation.

### C.

### Federal Jurisdiction Was Adequately Shown.

In asking for a Writ of Certiorari, petitioners say that the Circuit Court of Appeals reinstated the plaintiff's bill of complaint on the strength of a general averment of the jurisdictional amount (p. 9).

It is clear from the bill of complaint that protection of plaintiff's right to occupy and enjoy its property is sought. Protection of that right now and in the future is prayed for.

That is the controversy, and plaintiff specifically pleads in the first paragraph of the bill of complaint that the amount in controversy exceeds $3,000. As respondent has already pointed out, nowhere in defendants' motion to dismiss is there any question raised that the plaintiff's property rights are not worth $3,000. Instead, defendants sought to establish that the plaintiff must show $3,000 in monetary damages against each defendant.

The case of *Clark v. Paul Gray*, 306 U. S. 583 (1939), cited by the petitioners at page 20 of their brief does not sustain their contention. Obviously, a general allegation that the amount involved is in excess of $3,000 will not suffice where *numerous plaintiffs* having no joint or common interest or title in the subject matter of a suit fail to indicate that the claim of any single plaintiff exceeds the jurisdictional amount. The instant action does not involve any such attempted aggregation of claims.

Plaintiff's action in the instant case meets the test prescribed in *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178 (1936), also strongly relied upon by petitioners, because the bill of complaint alleges all the facts essential to show jurisdiction. As the Circuit Court of Appeals points out in its opinion: "It is suggested by the appellees that the plaintiff has not gone into specific details on various phases of the matters complained of and that its averments are too general and do not include ultimate facts. The proposition as presented may be material on a demand for particulars but it does not substantially detract from the fact that *plaintiff has stated a cause of action against the defendants on which it is entitled to its day in Court and to the opportunity of presenting its proof.*" (30) (Emphasis supplied.)

Under no circumstances in an action of this kind should the amount in controversy be tested by the size of the monetary damages recoverable against each coal operator. In *Little Schuylkill Navigation, Railroad and Coal Company v. Richard's Administrator*, 57 Pa. 142, 146 (1868) the court said:

> "* * * The right of action arises upon the act of throwing the dirt into the stream—this is the tort, while the deposit below is only a consequence."

The instant plaintiff is complaining that the defendants are throwing dirt into the Schuylkill and that their actions in this respect are an invasion of plaintiff's property rights. Is plaintiff deterred from resorting to a federal court to enjoin such trespasses until there are three thousand dollars in monetary damages definitely traceable to each defendant. Surely not! It is not required that a court of equity be able to determine from the bill of complaint the precise monetary damages which plaintiff may be entitled to for past injuries, nor is it necessary that the bill of complaint set forth a mass of data relating to the proof of damages. In an action of this kind the invasion of a right, equal in value to the jurisdictional amount, even if otherwise unaccompanied by monetary damages, is sufficient to invoke the equitable power of the court, and an injunction may clearly issue to prevent future wrong.

*Miles Laboratories, Inc. v. Seignious,* No. 981, 30 F. Supp. 549 (District Court, E. D. South Carolina) 1939, involved a suit for injunctive relief under a South Carolina statute, known as "The Fair Trade Act." Jurisdiction was questioned on the ground, among others, that there was no showing of damage to the plaintiff, particularly in excess of three thousand dollars. The court said, at pages 554 and 555:

> "(5) It is quite true that the plaintiff makes no attempt by pleading or proof to evalue in money the damage to it by the five sales of Alka-Seltzer made by the defendant, each at a few cents under the so called 'fair trade price.' Nor does the plaintiff contend that these five sales did cause monetary damages to it in excess of three thousand dollars. However, it is a firmly established principle of law that when a litigant seeks an injunction to protect a right, and shows that

some invasion of that right has occurred, or been threatened, the test of the jurisdictional amount is the value of the right that is to be protected, and not the extent of the monetary loss or damage that has been suffered or is threatened by the invasion . . . (7) The position of the defendant, aside from the question of the existence of the jurisdictional amount, that the court is without power to administer the equitable relief of injunction unless some monetary damage to the plaintiff be shown, is entirely unsound. Not only is an invasion of a right, unaccompanied by monetary damage, sufficient to invoke this power of the court of equity, but even a threatened wrong, that has not actually occurred, is sufficient. Swift and Company v. United States, 276 U. S. 311, 48 S. Ct. 311, 72 L. Ed. 587; State of New York v. State of Illinois, 274 U. S. 488, 47 S. Ct. 661, 71 L. Ed. 1164; Standard Oil Co. of Maine v. Standard Oil Co. of New York, 1 Cir. 45 F. 2d 309, State ex rel. Lyon v. Columbia Water Power, 82 S. C. 181, 63 S. E. 884, 22 L. R. A., N. S., 435, 129 Am. St. Rep. 876, 17 Ann. Cas. 343.

"In the first case, supra, Mr. Justice Brandeis, speaking for the court, says (276 U. S. 311, 48 S. Ct. 314, 72 L. Ed. 587): 'The argument ignores the fact that a suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction may issue to prevent future wrong, although no right has yet been violated.'

(8, 9) "Not only is the absence of monetary damage not a reason for denying injunctive relief, but on the contrary it supports an application for such relief. The fact that there has been no monetary damage accompanying the invasion or threatened invasion of a right, or that the monetary damage is trivial, evidences the inadequacy of a remedy at law, and the inadequacy of a legal remedy is a prerequisite to equitable relief. . . ."

Under all the circumstances of the instant case there was an adequate basis for a court to find that the amount in controversy exceeds the sum of three thousand dollars, exclusive of interest and costs, and that the complaint comes within the jurisdiction of a federal court. The case differs from *Leitch v. City of Chicago et al.* (C. C. A. 7th, 1930) 41 F. (2d) 728 (Certiorari denied 282 U. S. 891, 51 S. Ct. 106, 75 L. Ed. 786 (1930) cited by the defendants. The allegation there was that the *land* was worth many times the jurisdictional amount of $3,000. The Court said:

> "This may well be true, and yet the *value of the riparian rights,* or the damage to the land by reason of filling up the stream, may be very little." (Emphasis supplied.)

In the instant case there is no allegation that the land is worth in excess of $3,000, but there is an allegation that the *amount in controversy* is in excess of $3,000. The subject of the controversy is the protection of plaintiff's riparian rights. Consequently, there is an allegation that the value of the instant plaintiff's riparian rights is in excess of $3,000, a matter which defendants have not yet attempted to deny.

## D.

## The Bill of Complaint States a Cause of Action.

### (1) Special Damage Is Shown.

Petitioners say that in paragraph 14 of the bill of complaint the plaintiff describes their activities as amounting to a nuisance. Such a nuisance, petitioners continue, would be a public one, involving impairment of the navigability of the stream, and respondent has standing to enjoin such a public nuisance only if it can show that it has suffered injury therefrom different in kind and degree from that suffered by other riparian owners and members of the general public coming into contact with the nuisance.

The rights of the general public in the navigability of the Schuylkill River are important, surely, but the respondent's immediate concern is the protection of its own riparian rights against *continuing trespasses.* The Circuit Court of Appeals correctly answered defendants' objection when it stated:

> "In the situation before us the plaintiff is a lower Schuylkill River riparian owner who charges a continuing trespass to and upon its property resulting in irreparable injury to the property and to its business. In so doing the plaintiff is directly asserting some extraordinary damage beyond that incurred by the general public and we think, comes within the scope of the Knowles opinion." (30)

The opinion of the Circuit Court of Appeals quotes at length from *Knowles v. Pennsylvania Railroad Co.,* 175 Pa. 623. In the interest of brevity the quotation will not be duplicated here. It is sufficient to observe that the case fully warrants and supports the view of the Circuit Court of Appeals on the Pennsylvania law applicable to this phase of the case.

Respondent's rights as a riparian owner rise higher than the rights of the general public in the stream. See, for example, *Philadelphia v. Philadelphia Suburban Water Co.,* 309 Pa. 130 (1932), where Mr. Justice Drew states, at page 150:

> "The Schuylkill is a navigable river, and in its waters the interests of navigation are second only to the paramount right of riparian owners to take water for domestic use: Phila. v. Collins, supra; Phila. v. Gilmartin, supra; Hunt v. Graham, 15 Pa. Superior Ct. 42. . . ."

Petitioners cite *The Buck Mountain Coal Company v. The Lehigh Coal and Navigation Company,* 50 Pa. 91 (1865), as an instance where a private party was held to

have no standing to abate a public nuisance. However, in that case an Act of Incorporation of 1822 imposed the duty on defendant to keep and maintain the slack water system in order and repair. A failure to perform that duty was a failure to perform a duty owing to the public. The plaintiff there did not establish a failure of a duty towards itself. The instant case is not at all analogous. Here the defendants have a duty not to injure the plaintiff as a lower riparian owner.

*Gold v. The City of Philadelphia,* 115 Pa. 184 (1886), also relied upon by petitioners, involved a municipal corporation. In the decision of the case, it is stated, at page 198:

> "When a duty is imposed upon a municipal corporation for the benefit of the public, no consideration or benefit is received by such municipality, as in the case of a trading corporation, hence no implication arises of liability to the individual citizen for any injury he has suffered in common with other citizens resulting from a neglect of such duty. To sustain a contrary doctrine would be disastrous to municipalities, and consequently to the general public. If we once throw open the door to a recovery in such cases, how are we to measure the extent to which a public highway may be out of repair to entitle owners of property abutting thereon to recover damages?"

No such public considerations are involved in the instant action.

At pages 28 and 29 of their brief, petitioners quote from *Rhymer v. Fretz,* 206 Pa. 230 (1903), where a plaintiff was held to have no standing to enjoin the construction of a building. The Court said at page 233:

> ". . . His only complaint is that the erection of the building and the uses to which it will be put 'will jeopardize the safety and endanger property in this vicinity from fire, and by reason thereof, together with

the unlawful gathering of persons in the neighborhood, will deprive himself and his neighbors of the full enjoyment and proper use of their property and home.' . . ."

This quotation immediately precedes the portion of the *Rhymer* decision quoted by the petitioners, and thoroughly explains the court's further remarks (quoted by petitioners) that in such averment there is no showing of special damage to the plaintiff. In the instant case, on the other hand, the plaintiff charges a continuing trespass to and upon its property, resulting in irreparable injury to the property and to plaintiff's business. As the Circuit Court of Appeals has found, the instant plaintiff has directly asserted some extraordinary damage beyond that incurred by the general public.

2. Unlawful Mining Is Alleged.

Petitioners charge that the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable Pennsylvania decisions relating to the mining industry (p. 9 of petition). In developing the point in their brief petitioners draw heavily upon *The Pennsylvania Coal Company v. Sanderson,* 113 Pa. 126, 6 Atl. 453 (1886), saying that the Supreme Court of Pennsylvania has therein "limited the application of the maxim, *sic utere tuo et alienum non laedos,* which is generally observed, in favor of the proposition that harm caused to one land owner by another as the necessary and unavoidable result of a natural use of his land by the latter, without negligence or malice, is *damnum absque injuria.*" (p. 30)

The Supreme Court of Pennsylvania has several times found it necessary to comment upon the *Sanderson* case, and to limit its application. *Robertson v. Coal Co.,* 172 Pa. 566 (1896), was an action of trespass to recover damages for subsidence of surface caused by alleged negligent mining. Mr. Justice Williams stated, at page 572:

". . . For myself I would permit no general rule of this sort to work confiscation in either case, but leave to a court of equity the adjustment of the terms and conditions on which each could use his own so as to inflict the least practicable injury on the other. This court however, is not disposed at present to modify the rule of Sanderson's case as it is stated above. That rule has no application to this case."

*Sullivan v. Jones & Laughlin Steel Company,* 208 Pa. 540 (1904), involved a bill in equity for an injunction against the escape of dust from blast furnaces. The opinion by Mr. Justice Brown states at page 549:

"The changed conditions brought about by the appellee have not resulted from the development and natural use and enjoyment of its own property, as was the situation in *Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, the doctrine of which case has never been and never ought to be extended beyond the limitations put upon it by own own facts. . . .*" (Emphasis supplied.)

See, also, *Pennsylvania R. R. et al. v. Sagamore Coal Co., et al.,* 281 Pa. 233 (1924), where Mr. Justice Schaffer states (pp. 248, 249):

"We now come to the consideration of the conclusion of the trial judge that the right to drain the mine water into the stream is a property right. To reach this determination, he gave to the Sanderson case a much broader effect than it has ever before been given and overlooked how limited has been its application. It is somewhat difficult to understand why he badged the draining of the mine water into the stream as a 'property right' in the defendants, of which they cannot be deprived except upon payment being made to them. Nothing said in the Sanderson opinion warrants such conclusion even from the standpoint of the

private right involved and certainly not where public rights are at stake. No such term as a right of property was applied in that decision to the act of the mine owner in polluting the stream. He was taken out of the rule that his act was one of nuisance, by the exceptional situation there existing, and it was expressly stated that the privilege accorded to him would not be sanctioned where the public is concerned. . . ."

In *Venzel v. Valley Camp Coal Co.*, 304 Pa. 583 (1931) Mr. Justice Kephart says, at page 589:

"Where dangerous gases accumulate on a property from its lawful use in mining coal, and where it is reasonably forseeable that such gas may escape and injure persons on adjoining property, there is an affirmative duty on the owner to prevent, if possible, the escape of such gases to his neighbor's property. We have so held with regard to water coming from mines which drains into streams used as public drinking supplies: P. R. R. Co. v. Sagamore Coal Co., 281 Pa. 233. *To that extent, the case of Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, and all other Sanderson Cases treating the subject, have been overruled.*" (Emphasis supplied.)

Thus, it is evident that in some respects the *Sanderson* case has been overruled, while in other respects it has been qualified. In any event, it is practically limited to its own facts. In *Harvey v. Susquehanna Coal Company,* 201 Pa. 63 (1902)—a case cited by petitioners—there was an action in trespass for injuries to real estate caused by the alleged negligent escape of coal duct from a breaker. The opinion by Mr. Justice Brown takes up the contention of the appellant that the injury is damnum absque injuria under the *Sanderson* case and points out (pp. 66, 67):

". . . This same case was held to be 'not at all in point in Hindson v. Markle, 171 Pa. 138, where it was

decided that the owner of coal mines may deposit refuse and culm upon his own land, and if the same are carried away by extraordinary floods into a stream which runs through the land of a lower owner, spreading thence over such lower land, the owner of the coal land is not responsible in damages to the lower owner for the injury thus sustained; but, if the refuse is placed on his own land, in a position where it is washed into the stream by ordinary storms, or if he deposits his refuse and culm directly in the stream, and damage thereby results to the lower owner the mine owner or operator is liable for the damage and injury thus occasioned to the lower owner. Referring to the Sanderson case and its inapplicability, the late Chief Justice Green said: 'That was the mere flowage of natural water which was discharged by natural and irresistible forces, necessarily developed in the act of mining prosecuted in a perfectly lawful manner. While the mine water thus discharged polluted the water of the stream in which it necessarily flowed, it caused no deposit of any foreign substance on the land of the plaintiff and did not deprive her of its use. . . .'"

Also in *Elder v. Lykens Valley Coal Co.*, 157 Pa. 490 (1893)—another case cited by petitioners—the opinion by Mr. Justice Williams states, at page 497:

". . . But he must deposit the culm and refuse on his own lands. He has no right to throw it into the streams, or leave it where ordinary floods will carry it down upon the lands of others; Lentz v. Carnegie Bros., 145 Pa. 612. If he does throw it into the stream, or leave it where ordinary floods will carry it away, then the injury that his neighbor may suffer therefrom is not the natural and necessary consequence of the rightful mining of coal, but of the want of proper care in disposing of the refuse product of the mines. For an injury resulting from the want of care, an action will lie. It may be convenient or economical for the

coal owner to throw the refuse of his mines into the streams, but that is not enough. He is bound to consider the rights of others. If he takes the risk of injuring others to save trouble or expense for himself, he makes himself liable for the loss his conduct may inflict on his neighbors. These general rules are settled by a multitude of cases."

In the instant case the injuries complained of are not the result of the natural and necessary mining of coal, but of the want of proper care in disposing of the refuse products of the mines. The complaint charges the defendants with wilfully, negligently, recklessly, wantonly and unlawfully discharging water heavily burdened and polluted with coal dirt, fine coal, culm, refuse, materials and silt wastes, into the stream (par. 7—4a). It charges the defendants with depositing in the Schuylkill or its tributaries and upon the banks thereof large quantities of coal dirt, fine coal, culm, refuse materials and silt wastes which come from their mines, collieries, coal washeries and coal preparation plants (par. 8—4a). It is charged that defendants have negligently failed to secure their culm piles against erosion and that as a result the stream has been heavily charged and polluted (par. 9—4a, 5a). It is charged that the coal wastes are carried to and upon the premises of the plaintiff (par. 10—5a) and that they have raised the bed of the river and narrowed its channel, so that through rains and otherwise, the river overflows its banks at and along plaintiff's property (par. 12—5a).

It is clear that the defendants have been charged with unlawful and negligent acts in the conduct of their mining operations. Consequently, the Circuit Court of Appeals in reinstating the complaint has not, as petitioners allege, decided an important question of local law in a way probably in conflict with applicable Pennsylvania decisions relating to the mining industry, but has rendered its decision in accordance with the principles of law and equity properly applicable to the instant case.

## CONCLUSION.

In summation, respondent submits that the averments of the bill of complaint constituted an entirely adequate statement and showing of all the grounds on which federal jurisdiction depends, and of a claim wherein the plaintiff is entitled to its day in court and an opportunity to go forward with its proof.

The action of the Circuit Court of Appeals in so construing the complaint, and in giving to its averments force and effect, is altogether reasonable and is fully warranted under the facts of the law.

Petitioners have not demonstrated any incompatibility, such as they allege exists, between the decision of the Circuit Court of Appeals and other decisions of this Court and of the Supreme Court of Pennsylvania. The decision of the Circuit Court of Appeals is well reasoned and carries ample supporting citations of authority. The determination of the Circuit Court of Appeals with respect to the amount in controversy fully harmonizes with the applicable decisions of this Court, and its action in reinstating the complaint is in nowise at variance with the decisions of the Supreme Court of Pennsylvania.

Consequently, respondent respectfully submits that petitioners have not established such special and important reasons as to indicate any case for the interposition of this Court by certiorari.

Respectfully submitted,

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